Supreme Court, U.S.
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No. 00-219

IN THE

Supreme Court of the United States

CONCHO RESIDENTIAL SERVICES, INC.,

Petitioner,

v.

MHMR SERVICES FOR THE CONCHO VALLEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, THIRD JUDICIAL DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Neither corporate respondent herein has a parent corporation and no publicly held company owns 10% or more of the stock of either corporate respondent.

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REASONS FOR DENYING THE WRIT

Petitioner presents no compelling reasons for grant of a writ of certiorari and no substantial question of federal law meriting the Court's consideration. Rather, Petitioner's claims center around its belief that the Texas Court of Appeals has improperly interpreted and applied Texas' Free Enterprise and Antitrust Act of 1983.[1] While the Texas antitrust statute looks to federal antitrust law as a model for state standards, the decision to incorporate these standards is itself the product of state, not federal law. Even granting the tangential relationship of federal law to this controversy, the Texas Court of Appeals' decision is well supported by independent and adequate state law grounds, consisting of state law antitrust exemptions that do not rely at all on guidance from federal law. Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

I.

THE DECISION OF THE TEXAS COURT OF APPEALS IS SUPPORTED BY INDEPENDENT AND ADEQUATE STATE GROUNDS.

This Court will not review a state court decision that rests upon independent and adequate grounds, even if the case also implicates a federal question. *Fox Film Corp. v. Muller*, 296 U.S. 207, 209-10 (1935). If the state ground alone is dispositive, then the Court lacks jurisdiction.

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1. Texas Free Enterprise and Antitrust Act of 1983, 68th Leg. R.S., ch. 519, 1983 Tex. Gen. Laws 3010, codified at Tex. Bus. & Com. Code § 15.01 *et seq.* (West 1994).

E.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977).

In this case, an independent and adequate state ground of decision exists as to each of the Petitioner's issues directed at the Court of Appeals' disposition of its antitrust claims. *See* Questions Presented, Issues 1-4. Petitioner's Issues 2-4 address the incorporation of the federal "state action" doctrine into the Texas antitrust statute. While it is true that the Court of Appeals discussed and relied in part on the federal antitrust "state action" doctrine in disposing of Petitioner's appeal, it also recognized that an independent and adequate state law antitrust exemption was dispositive of the issues before it. After discussing the federal "state action" doctrine, the Court of Appeals went on to note:

> [i]n addition, the Texas Act includes its own state-action exemption. Section 15.05 of the Antitrust Act specifically exempts "actions required or affirmatively approved by any statute of this state . . . or by a regulatory agency of this state . . . acting under . . . statutory authority vesting the agency with such power." *See* Bus. & Com. Code § 15.05(g). Accordingly, we hold that the trial court properly granted a take-nothing summary judgment against [Petitioner] on its antitrust claims against Concho Valley and Central Plains.[2]

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2. The passage quoted above from the Court of Appeals' opinion was omitted from the version of that opinion included in Petitioner's Appendix. It is included at page 7 of the Court of Appeals' Slip Opinion, which corresponds to page 25 of Petitioner's Appendix 8.

Recognizing the application of an independent, state law antitrust exemption to the facts of the case, the Court of Appeals of affirmed the trial court summary judgment on this ground as well.

The same analysis applies to Petitioner's Issue 1, addressing the scope of the remedies provision of the Local Government Antitrust Act of 1984. *See* 15 U.S.C.A. §§ 34-36 (West 1997). The Court of Appeals did invoke the provisions of this act in disposing of some of Petitioner's claims against a single party, Tom Green County. Pet. App. 8 at 26. The Court of Appeals, however, went on to determine, as an alternative ground for affirming the trial court:

> Further, as previously noted, the Texas Act also includes its own state-action exemption, which we conclude is expansive enough to cover the County's participation in the anti-competitive scheme. . . . Accordingly, we hold that the trial court did not err in dismissing CRS's antitrust claims against Tom Green County.

Id. (citation omitted). In each identified instance, the presence of an independent and adequate state law basis for the Court of Appeal's opinion and judgment deprives this Court of jurisdiction.

II.

PETITIONER PRESENTS NO COMPELLING REASON FOR GRANT OF ITS PETITION FOR CERTIORARI.

This Court grants certiorari only for "compelling reasons." Supreme Court Rule 10. Typically, this means either: 1) a conflict exists between the state court decision under review and that of another state court of last resort, a federal appeals court or "relevant decisions of this Court"; 2) a substantial departure by the court under review "from the accepted and usual course of judicial proceedings"; or 3) a decision on "an important question of federal law that has not been, but should be, settled by this Court. . . ." *Id.* Petitioner identifies no conflicts, complains of no egregious judicial conduct and makes no showing of any important, unsettled federal issue for this Court to decide. Instead, the Petition focuses primarily on narrow areas of disagreement with the Court of Appeals' decisions on the scope and interpretation of state antitrust law. Review of Petitioner's individual Questions Presented confirms this overall picture.

None of Petitioner's issues raise a substantial, important federal question. Issue 1, addressing the meaning of the Local Government Antitrust Act of 1984 ("LGAA") and its application to Respondent Tom Green County, is answered by the plain words of the statute and by numerous federal court decisions. There is no dispute that the LGAA immunizes local government entities from damages, but not from injunctive relief. *See* 15 U.S.C.A. § 35(a); *See, e.g.*, *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 369 n.2 (1991). Petitioner, however, did not seek antitrust based injunctive relief, but only damages,

against Tom Green County. Accordingly, the application of the LGAA to requests for injunctive relief was not an issue either "pressed or passed" upon by the Court of Appeals. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 218 (1983). As far as the LGAA is applicable in the circumstances of this case, the Court of Appeals correctly relied on the LGAA to immunize Tom Green County from liability for damages. Moreover, as explained above, the Court of Appeals clearly indicated that the LGAA was an alternative ground for affirmance, which the Court of Appeals coupled with independent and adequate state law immunity for Tom Green County. Pet. App. 8 at 26.

Likewise, the issues raised by Petitioner concerning the scope of "state action" immunity are not worthy of this Court's attention. In Issue 2, Petitioner simply complains that the Court of Appeals did not adequately explain its reasoning for recognizing "state action" immunity as an element of Texas antitrust law in the circumstances of this case. Petitioner provides no citation or analysis that even begins to explain what federal law issue this complaint invokes, other than a conclusory, unsupported reference to "due process." Pet. for Cert. at 14. Moreover, with all due respect, Petitioner's complaint is belied by the Court of Appeals' opinion, which is clear and comprehensive in its discussion of the incorporation of federal "state action" immunity as a component of the Texas antitrust statute.

In Issue 3, Petitioner complains that Respondent Concho Valley is not a state agency and hence not entitled to "state action" immunity. Again, this argument raises no federal question at all. States are free in the exercise of their own sovereignty to determine the categories of agencies necessary to carry out state governmental policies. Petitioner's

disagreement with the State's creation of Concho as an agent of state policy for the care of the mentally retarded is no more than a quarrel with the Court of Appeals on a matter of state law. *See, e.g., Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945) (matters of state law not Court's concern). Additionally, Petitioner's analysis of whether Concho is a proper state agency depends on evaluation of the particulars of Concho's creation and activities, viewed in light of a comprehensive regulatory scheme which is the product of state legislation. These are matters as to which this Court should defer to the state courts below. *Cf. Village of Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 455 U.S. 489, 495 (1982) (in reviewing challenge to state law, Court should consider state court limiting construction).

As with Petitioner's other antitrust issues, Issue No. 4 involves matters of state, rather than federal law. Specifically, Petitioner argues that the Court of Appeals "lacked a colorable basis for its conclusion that ¶ 15.04 of the Texas Free Enterprise & Antitrust Act of 1983 incorporates the federal *Parker* 'state action' doctrine." Pet. for Cert. at 22. The choice of immunities that are to be included in a state antitrust statute is manifestly a matter of state law. The Texas Legislature could have legislated "state action" immunity identical to that articulated by the Court of Appeals in its opinion without reference to federal law, or by reference to the antitrust jurisprudence of some other state. So long as the Texas Legislature limited the scope of that immunity to actions brought under the state antitrust statute, that immunity would unquestionably be the product of state law. By the same reasoning, the decision to incorporate some portion of federal antitrust jurisprudence as **a model** for purely state-law antitrust application involves a choice within the prerogative of the state sovereign.

Finally, Petitioner's Issue No. 5 likewise raises no credible question of federal law. Reduced to its essence, Petitioner's complaint here is that the Concho Valley Community Center was initially created without the execution of a written contract among the local government entities involved in forming the community center. Petitioner alleges that unless the statute authorizing creation of the community center[3] is interpreted to include a requirement that the creation be pursuant to a written contract, the statute would be void for vagueness. Pet. for Cert. at 26-27. The remainder of Petitioner's discussion under this point, however, is simply a critique of the Court's interpretation of the statute in question and of the adequacy of the Respondents' efforts to comply with the statute in creating an MHMR community center; again, this critique raises purely state law issues.

Petitioner utterly fails to demonstrate why the requirement of a contract documenting the creation of the community center is essential to the constitutionality of the statute authorizing the center's creation. The Court of Appeals held, as a matter of state law statutory interpretation, that the use of a contract as a creating document was not mandatory. Pet. App. 8 at 27. If the reference to a contract in the enabling statute is left out, the statute nevertheless directs that "one or more [specified local agencies] may cooperate [and] negotiate . . . with each other through their governing bodies to establish and operate a center." MHMR Act ¶ 3.01. In combination with the other terms and provisions of the original MHMR Act, it is plain that the statue provides ample notice to members of the public of its

3. Mental Health and Mental Retardation Act ("MHMR Act"), 59th Leg., R.S., Ch. 67, 1965 Tex. Gen. Laws 165-174, initially codified at Tex. Rev. Stat. Ann. art. 5547-201 *et seq.*

intent to establish community centers as an aid to the State's mentally retarded citizens and the means to carry out that intent. *See, e.g., Village of Hoffman Estates*, 455 U.S. at 503 (vagueness review inquires whether law affords fair warning of what is proscribed). Moreover, since the statute complained is not directed at regulating the conduct of any individual or class of persons, it is difficult to see how Petitioner's vagueness challenge has any meaning as applied to the statute in question. In short, Petitioner's contentions regarding the notice provided by the statute are groundless.

CONCLUSION

When all is said and done, the Petition accomplishes no more than to quarrel with the Court of Appeals' interpretation and application of state antitrust law, in the context of a state antitrust suit pressed against a state governmental entity. To the extent the Petition discusses the incorporation of federal "state action" immunity as an element of the Texas antitrust statute, the Petition reveals no important federal question and no threat to the uniform application of well established federal jurisprudence as a result of the Court of Appeals' unpublished opinion, with its limited application to Texas law. The due process claims purportedly raised by the Petition are, on their face, entirely lacking in substance and in merit.

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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